SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1009

FIRST SECURITY BANK OF UTAH, N.A.,
PETITIONER,

vs.

COMMERCIAL SECURITY BANK.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,356

First Security Bank of Utah, N. A.
Ogden, Utah, *Appellant*,

v.

Commercial Security Bank, Ogden, Utah, *Appellee*.

Joint Appendix

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[fol. 1]

In United States District Court
For the District of Columbia

Docket Entries

Docket 1815-63

1963

July 18—Summons, copies (3) and copies (3) of Complaint issued ser. 7-18; Ab ser. 7-19; DA ser. 7-19.

July 18—Motion of Pltff. for Temporary Restraining Order, Affidavits (2); Exhibits A & B; P & A.—filed.

July 18—Motion of Pltff. for Preliminary Injunction; P & A—filed.

July 19—Injunction undertaking of James F. Bell, attorney for Pltff. in the sum of One Hundred Dollars—filed.

July 19—Temporary Restraining Order; $100.00 undertaking; issued at 10:00 A.M. (N) ser. 7-19; DA ser. 7-19; AG ser. 7-20, Curran, J.

July 19—Order fixing July 29, 1963 at 10:00 A.M. for hearing on Motion for Preliminary Injunction (N) Curran, J.

July 26—Motion of Pltff. for postponement of date of hearing of motion for preliminary injunction; Exhibit A—filed.

November 8—Consent Order extending time for deft. to plead to and including December 1, 1963. (N) Holtzoff, J.

December 2—Consent Order extending time for deft. to plead to and including January 3, 1964 (N) McGarraghy, J.

1964

January 2—Consent Order extending time for deft. to plead to and including February 3, 1964 (N) Holtzoff, J.

[fol. 2] February 4—Consent order extending deft.'s time to plead or otherwise defend to March 3, 1964 (N).

March 5—Order extending time to answer to and including April 3, 1964 (N). Keech, J.

April 13—Consent order extending deft.'s time to answer to and including May 4, 1964 (N) Curran, J.

May 27—Consent order extending time to answer to and including July 1, 1964 (N) Curran, J.

June 26—Motion of First Security Bank of Utah, N.A., for leave to intervene; c/m 7-25-63; points and authorities; Exhibit; Deposit by John J. Wilson, $5.00; appearance of Whiteford, Hart, Carmody & Wilson (815-15th Street, N.W.), as attorneys for Applicant; M.C. 6-26-64.—filed.

June 26—Motion of deft. to dismiss; c/m 6-26-64; Memorandum; M.C. 6-26-64.—Filed.

June 26—Motion of intervenor for summary judgment; c/m 6-25-64; Memorandum M.C. 6-30-64—filed.

June 26—Order granting Motion of First Security Bank of Utah, N.A., to intervene as party defendant (N) Curran, J.

July 6—Cross Motion of Pltff. for summary judgment; Statement of material facts; points and authorities in support of Cross Motion and in opposition to deft.'s Motions; c/m 7-6-64; M.C. 7-6-64—filed.

July 17—Statement of material facts in support of motion of deft. No. 2 for summary judgment; c/mailing—filed.

August 13—Opposition of deft. No. 2 to pltff.'s Motion for Summary Judgment. c/m 8-12-64.

October 5—Supplemental Memorandum of pltff. in support of Cross Motion for summary judgment; Appendix A and B; ser/ack. 10/5/64—filed.

October 7—Motion to dismiss; Motion for summary judgment by intervenor and Cross Motion for summary judgment by intervenor and Cross Motion for summary judgment argued and taken under advisement. (Rep. Roger E. Frye) Walsh, J.

October 7—Memorandum of deft. James J. Saxon—filed.

[fol. 3] October 19—Appearance Brian C. Elmer as attorney for pltff.—filed.

December 18—Memorandum and Order denying motion of defendant to dismiss; denying motion of Intervenor-Defendant for summary judgment; and granting Motion of pltff. for summary judgment; deft. is enjoined from authorizing the establishment of the branch bank by the Intervenor-Defendant, (N) Micro. 12/21/64 Walsh, J.

1965

February 12—Notice of Appeal by Intervenor from Order 12/18/64; copies to James Bell, U.S. Attorney and Attorney General; Deposit $5.00 by C. Steele—filed.

February 15—Appearance Richard S. Beatty, as Attorney for deft. No. 1.—filed.

February 15—Notice of appeal by Deft. no. 1 from Order 12/18/64; copy to James Bell and Whiteford, Hart, Carmody & Wilson.

February 17—Cost bond on appeal by pltff. in sum of $250.00 with The Travelers Indemnity Company—approved. "fiat" Matthews, J.

March 17—Order extending time for deft. no. 1 to file and docket record on appeal to fifty (50) days to and including May 13, 1965 (N) Walsh, J.

March 19—Order extending time for Intervenor, First Security Bank of Utah, N.A. to file and docket record on appeal for 50 days, to and including May 13, 1965 (N) Matthews, J.

May 12—Record on appeal delivered to USCA. Deposit by C. J. Steele $1.55—filed.

May 12—Receipt from USCA for original papers—filed.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, Plaintiff,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Defendant.

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed July 18, 1963

Now comes the plaintiff by its undersigned attorney and moves this Court as follows:

To grant forthwith and without notice a temporary restraining order restraining and enjoining the defendant

or his agents from issuing to the First Security Bank of Utah, N.A. a Certificate or any other writing approving and authorizing the establishment and operation by the said First Security Bank of Utah, N.A. of a branch bank at a location on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, pending a hearing on, and disposition of plaintiff's Motion for Preliminary Injunction filed herein on July 18, 1963; and for cause refers to the Affidavits attached hereto, and made a part hereof, and to the Statement of Points and Authorities in support of this Motion, and further refers to the Complaint Requesting Declaratory Judgment and Injunctive Orders and to the Motion for Preliminary Injunction, both filed herein on July 18, 1963.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333

Neil R. Olmstead, Ogden, Utah, Of Counsel.

[fol. 5]

AFFIDAVIT OF ROBERT G. HEMINGWAY IN SUPPORT OF MOTION

State of Utah
County of Weber ss

Robert G. Hemingway, being first duly sworn, on oath deposes and says:

He is President of Commercial Security Bank, plaintiff in the above entitled action, and as such he makes and submits this affidavit for and on behalf of said Bank in support of its motion for a temporary restraining order and preliminary injunction therein.

Commercial Security Bank is a banking corporation organized and existing under the laws of Utah. Its prin-

cipal office and place of business is at 2491 Washington Boulevard, within the corporate limits of Ogden, Utah, and it has a branch office within the corporate limits of said Ogden, Utah, located at 458 25th Street. By the laws of Utah it is restricted from establishing any additional branch in the said City of Ogden.

Plaintiff, Commercial Security Bank, has customers and depositors who reside or have their places of business in the vicinity of the location of the proposed branch of the First Security Bank of Utah, N. A., and affiant verily believes,

1. As of July 1, 1963, the number of depositors of plaintiff Bank who reside within a one mile radius of the location of the proposed branch of First Security Bank of Utah, N, A. exceeds fifteen percent of plaintiff's total depositors.

2. The deposits of plaintiff's depositors who reside within such one mile radius exceeds fifteen percent of all of plaintiff's demand deposits.

3. The total of loans made by plaintiff to borrowers residing within such one mile radius exceeds fifteen percent of all loans made by plaintiff.

[fol. 6] A field examination of the application for the proposed branch was ordered by the Comptroller and such examination was completed today, July 16, 1963. Affiant is informed and believes that a report of such field examination will be immediately forwarded by the Examiner to his Regional Office in Denver, Colorado, and from there to the Comptroller of the Currency in Washington, D. C., and such report will be received by the Comptroller within a period of five to seven days from this date. Affiant is further informed that it is the policy of the Comptroller to act upon applications for branch banks immediately upon receipt of the Examiner's report, and affiant believes that the Comptroller will act upon the application of First Se-

curity Bank of Utah, N. A. for its proposed branch referred to above immediately upon receipt of the Examiner's report thereon.

Should the Comptroller of the Currency authorize the First Security Bank of Utah, N. A., which is the largest bank in the City of Ogden with combined resources in excess of Three Hundred Sixty Million ($360,000,000.00) Dollars, to open a branch bank in the area it proposes, plaintiff will necessarily suffer severe loss of loans, deposits and other business and will sustain damage to its business and profits of upwards of Fifty Thousand ($50,000.00) Dollars a year. Additionally, if the Comptroller of the Currency is permitted to issue his Certificate of Authority to First Security Bank of Utah, N. A. to open and operate the said branch, plaintiff would have no adequate remedy at law.

Dated July 16, 1963.

Robert G. Hemingway.

Subscribed and sworn to before me this 16th day of July, 1963.

Neil R. Olmstead, Notary Public, Residing at Ogden, Utah.

My commission expires: March 24, 1967.

[fol. 7]

AFFIDAVIT OF JAMES F. BELL IN SUPPORT OF TEMPORARY RESTRAINING ORDER

City of Washington
District of Columbia ss:

James F. Bell, being duly sworn, deposes and states:

1. That I am an attorney duly admitted to practice before the United States District Court for the District of Columbia.

2. On this day, July 18, 1963, at the request and by the direction of the plaintiff, Commercial Security Bank of Ogden, Utah, I have filed herein a Complaint for Declaratory Judgment and Injunctive Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation by the First Security Bank of Utah, N. A. (a national banking association) of a branch bank on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah, and at the same time I filed a Motion for Preliminary Injunction to restrain defendant from issuing said Certificate during the pendency of that Complaint.

3. The basis of the aforesaid Complaint and Motion is that defendant is prohibited by Title 12 United States Code, Section 36, from approving and authorizing a branch office of the aforesaid First Security Bank of Utah, N. A. at the location above-described.

4. As stated in the Affidavit of Mr. Robert G. Hemingway, President of Commercial Security Bank, the field investigation on the application of the First Security Bank of Utah, N. A. for a branch at the above location has been completed and the application, with the report thereon, will be at the Comptroller's office awaiting decision early next week.

5. It has been the announced policy of the defendant to give expeditious action to all applications of National banks

for branches. I verily believe, therefore, that the defendant may issue a certificate of authority to the First Security Bank of Utah, N. A. before this Court has an opportunity [fol. 8] to hear, or to act upon, plaintiff's pending Motion for a Preliminary Injunction.

6. The Complaint and the Motion for Preliminary Injunction herein allege, and I verily believe, that after the defendant issues his Certificate to the First Security Bank of Utah, plaintiff will have no legal remedy to prevent the operation of such branch office by said Bank at the allegedly illegal location on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

7. If defendant is not restrained immediately from issuing his Certificate of approval and authority to the First Security Bank of Utah, N. A. of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, the said Bank will, as soon as it receives defendant's certificate, open for business and commence operation of a branch office at the allegedly illegal location above-described, to the irreparable loss, injury and damage to the banking business of the plaintiff, and that the issuance by defendant of his Certificate will deprive the plaintiff of any legal remedy against such illegal action of the defendant.

James F. Bell.

City of Washington
District of Columbia ss:

Subscribed and sworn to before me this 18th day of July, 1963.

Mary Marticelli, Notary Public.

My Commission Expires Oct. 31, 1966.

(Seal)

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—
Filed July 18, 1963

Comes now the plaintiff herein and respectfully moves this Court to grant a preliminary injunction restraining the defendant from issuing his Certificate approving and [fol. 9] authorizing the establishment and operation by the First Security Bank of Utah, N. A., of a branch on Harrison Blvd., between 30th and 36th Streets, Ogden, Utah.

In support of such motion plaintiff states to the Court as follows:

1. Plaintiff is filing, simultaneously with this motion, a Complaint for Declaratory Judgment and Injunctive Orders against defendant requesting—

(a) A determination that the establishment and operation by the First Security Bank of Utah, N. A., (a national banking association) of a branch bank at the location above described would be a violation of Title 12 United States Code, Section 36 (National Banking Act);

(b) Orders restraining defendant from issuing his Certificate approving and authorizing the establishment and operation of such branch bank; and

(c) Such other and further relief as the facts and circumstances may require.

2. Plaintiff Commercial Security Bank, does now operate, and since July 30, 1925 has operated, a bank in Ogden, Utah, which bank was duly established under the laws of the State of Utah. In addition to its principal office it also operates a branch office in that city.

3. Title 12 United States Code, Section 36(c), authorizes the establishment and operation of branches by National Banks, with the approval of the Comptroller of the Currency, at locations where State banks are expressly per-

mitted by State law to establish and operate branches. The law of the State of Utah prohibits the establishment and operation of branches of State banks in a city or town in which is located any bank regularly transacting a banking business, with certain exceptions not here applicable relating to cities of the "first class." Utah Code Ann. Tit. 7, Chap. 3, Sect. 6. As the proposed location for the proposed [fol. 10] branch of the First Security Bank of Utah, N. A. is within the City of Ogden where there are presently three banks regularly transacting a banking business (Plaintiff, the Bank of Utah, and the Bank of Ben Lomand), the approval of the establishment of such branch by the defendant herein would be illegal.

4. Plaintiff further alleges, upon information and belief, that despite the prohibition of law described in paragraph 3 above, a field investigation by a National Bank Examiner of the application of the First Security Bank of Utah, N. A. for a branch has been completed, and that the said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the location described in its pending application, all in contravention of Title 12 United States Code, Section 36.

5. The issuance of the aforesaid Certificate by the defendant to the First Security Bank of Utah, N. A. would constitute conclusive legal authority of said bank to establish and operate its proposed branch at the location hereinbefore described, and such action could not be challenged by plaintiff in any subsequent proceeding. Therefore, the plaintiff has no adequate remedy at law.

6. Plaintiff further alleges that the issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The First Security Bank of Utah, N. A. is a much larger bank

than is plaintiff. The location at which it proposes to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden. A substantial number of the customers, depositors, and borrowers of the plaintiff are located in the vicinity of the proposed branch. If the First Security Bank of Utah, N. A., a bank many times larger than plaintiff, were allowed [fol. 11] to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury of the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

Wherefore, plaintiff prays the Court to hear this Motion promptly and to issue its preliminary injunction restraining defendant from issuing his Certificate above described pending the hearing and determination of the complaint herein filed.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333.

Neil R. Olmstead, Ogden, Utah, Of Counsel.

IN UNITED STATES DISTRICT COURT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE ORDER—Filed July 18, 1963

1. Plaintiff is a banking corporation organized under the laws of the State of Utah. Defendant is a duly constituted officer of the Executive Branch of the Government of the United States maintaining his official place of business in the District of Columbia and is an "agency" of the said Government within the meaning of Title 5 United States Code, Section 1001.

This action arises under Section 36 of Title 12 of the United States Code, commonly referred to as the National

Bank Act. As hereinafter set forth, plaintiff is engaged in the banking business in the State of Utah, where it has a large investment in capital, property, equipment and goodwill, irreparable damage to which is threatened by certain action of the defendant described hereinafter. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

[fol. 12] This is a proceeding (1) for a declaratory judgment that the issuance by the defendant Comptroller of the Currency of his Certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah, would constitute a violation of Title 12 United States Code, Section 36, and (2) to enjoin the defendant Comptroller of the Currency from issuing to the First Security Bank of Utah, N. A. his Certificate of Authority for the establishment and operation of a branch bank on Harrison Blvd. between 30th and 36th Streets, Ogden, Utah.

2. Plaintiff is a state bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the authority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah.

3. Upon information and belief, on or about June 25, 1963, the First Security Bank of Utah, N. A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Blvd., between 30th and 36th Streets, in Ogden, Utah.

4. The First Security Bank of Utah, N. A., is a national banking association chartered by the Comptroller of the

Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office.

5. The approval and authorization by the defendant Comptroller of the Currency of the establishment and operation of a branch bank at the designated location by the [fol. 13] First Security Bank of Utah, N. A. is prohibited by Title 12 United States Code, Section 36(c). Title 12 United States Code, Section 36 provides in part as follows:

> "The conditions upon which a national banking association may . . . establish and operate a branch or branches are the following:
>
> • • • • • • •
>
> "(c) A national banking association may, *with the approval of the Comptroller of the Currency,* establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . . " (Emphasis supplied)

Under the foregoing provisions of Federal law a national banking association is accorded the right to establish and operate a branch with the approval of the Comptroller of the Currency only at such locations as the statute law of the State specifically authorizes State banks to establish and operate branches.

6. The statute law of the State of Utah, Utah Code Ann. Title 7, Chap. 3, Sect. 6 (1953, as amended), prohibits branches in any city or town in which is located any bank regularly transacting a customary banking business, with certain exceptions not here applicable relating to cities of the "first class":

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be estab-

lished in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. . . ."

[fol. 14] A city of the "first class" is defined under the statute law of Utah as one with a population in excess of 90,000 persons, while a city of the "second class" is defined as one with more than 30,000 and less than 90,000, persons. Utah Code Ann. Title 10, Chap. 1, Sect. 1, (1953 as amended). The City of Ogden is a city of the "second class".

7. The designated location of the proposed branch of the First Security Bank of Utah, N. A. is on Harrison Blvd., between 30th and 36th Streets, in the City of Ogden, Utah. There are three other banks regularly transacting a banking business in the City of Ogden, Utah. Plaintiff, as stated above, has both its main office and one branch in the City of Ogden. Two other banks also have their main offices located in the City of Ogden: the Bank of Utah, and the Bank of Ben Lomand.

8. Plaintiff alleges on the basis of the above-quoted provisions of the National Bank Act and of the statute law of Utah, that the establishment and operation of a branch of the First Security Bank of Utah, N. A. in the City of Ogden is prohibited because there are three other banks regularly transacting a customary banking business in said City. Accordingly, the issuance by the defendant of his Certificate approving and authorizing such proposed branch at the designated location would be illegal and in violation of Title 12 United States Code, Section 36.

9. Plaintiff alleges upon information and belief that, despite the patent prohibition of law described above, the field investigation of the application of the First Security Bank of Utah, N. A. for a branch by a National Bank Ex-

aminer has been completed, and that said application will be before the Comptroller for decision early in the week of July 22, 1963. Plaintiff verily believes that defendant, unless restrained, may, without any notice of intention to plaintiff, issue to the First Security Bank of Utah, N. A. his Certificate approving and authorizing the establishment and operation of a branch of said Bank at the loca-
[fol. 15] tion described in its pending application, all in contravention of Title 12 United States Code, Section 36.

10. Plaintiff further alleges that the issuance by defendant of his Certificate to the First Security Bank of Utah, N. A. will confer upon said Bank conclusive legal authority to establish and operate a branch in the vicinity of the location described therein; that under the precedent of prior judicial decisions the plaintiff may not challenge the validity of the said Certificate in a proceeding against the said Bank; and that plaintiff therefore has no adequate remedy at law.

11. Plaintiff further alleges that the unlawful issuance by defendant of his Certificate as aforesaid will cause great and irreparable damage to the banking business of said plaintiff. The location at which it is proposed to establish a branch is approximately 2 miles from the location of plaintiff's main office and branch within the City of Ogden, and a substantial number of plaintiff's customers, depositors, and borrowers are located in the vicinity of the proposed branch. Accordingly, if the First Security Bank of Utah, N. A., a bank which is many times larger than is plaintiff, were allowed to establish a branch at that location, a substantial part of the banking business and service now performed by plaintiff would be diverted, all to the financial detriment and irreparable injury to the plaintiff, and contrary to the provisions of Title 12 United States Code, Section 36.

Wherefore, plaintiff prays:

1. That the court enter a judgment declaring and adjudging that the defendant is prohibited by Title 12 United

States Code, Section 36, from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

[fol. 16] 2. That the court enter its order enjoining the defendant from issuing a Certificate of Authority authorizing the First Security Bank of Utah, N. A. to establish and operate a branch on Harrison Blvd., between 30th and 36th Streets in Ogden, Utah.

3. That the court, pending the final determination of this cause issue a preliminary injunction, restraining and enjoining defendant in the aforesaid manner and form.

4. That, pending the issuance of the aforesaid preliminary injunction, the court issue forthwith a temporary restraining order restraining and enjoining defendant in the aforesaid manner and form.

5. That the court grant plaintiff such other and further relief as may be just and proper.

James F. Bell, Attorney for Plaintiff, 1001 Connecticut Avenue, Washington 6, D. C., Telephone: EX 3-5333.

Neil R. Olmstead, Ogden, Utah, Of Counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action 1815-63

COMMERCIAL SECURITY BANK, Ogden, Utah, Plaintiff,

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, Defendant,

and

FIRST SECURITY BANK OF UTAH, N.A., Ogden, Utah,
Applicant for Intervention.

[fol. 17]

MOTION OF FIRST SECURITY BANK OF UTAH, N.A., FOR LEAVE TO INTERVENE—Filed June 26, 1964

Comes now the First Security Bank of Utah, N.A., a banking corporation organized and existing under and by virtue of the laws of the United States of America, Ogden, Utah, through its undersigned attorneys, and moves the Court for leave to intervene in the above-captioned civil action as a party defendant, and to move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same.

Applicant is the same First Security Bank of Utah, N.A., frequently referred to in the complaint and in the plaintiff's other papers filed herein; and seeks to intervene because the representation of its interest by the defendant Saxon may be inadequate and applicant may be bound by a judgment in this action; and because applicant's defense

and the main action have questions of law and of fact in common.

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Address: 815-15th Street, N.W., Washington 5, D. C., Attorneys for Applicant for Intervention.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING INTERVENTION AS PARTY DEFENDANT—June 26, 1964

Upon consideration of the motion of applicant, First Security Bank of Utah, N.A., for leave to intervene herein as a party defendant, and it appearing to the Court that applicant is entitled to intervene pursuant to the provisions of Rule 24 F.R.Civ.P., and it further appearing that the parties plaintiff and defendant do not oppose such motion, it is, by the Court, this 26th day of July, 1963

Ordered and Adjudged, that said motion to intervene be and it is hereby granted; and that the intervenor may [fol. 18] move or plead in its own behalf and oppose motions of the plaintiff, within the time allowed the defendant Saxon to do the same; and it is further

Ordered and Adjudged, that the intervenor, for good cause shown, is excused from the provision of Rule 24(c) requiring its motion to be accompanied by a pleading setting forth the defense for which intervention is sought.

Edward M. Curran, District Judge.

Do Not Oppose

James F. Bell, 1001 Connecticut Avenue, N.W., Washington, D. C., Attorney for plaintiff.

John W. Douglas, Assistant Attorney General, By R. Dickey Hamilton, c/o Department of Justice, Washington, D. C., Attorney for defendant Saxon.

IN UNITED STATES DISTRICT COURT

CROSS MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT—Filed July 6, 1964

Comes now the Plaintiff, which opposes Defendant First Security Bank's motion for summary judgment, and moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor against Defendant Comptroller on the following grounds:

1. There is no genuine issue as to any of the material facts upon which Plaintiff relies in support of its cross motion, and

[fol. 19] 2. Plaintiff is entitled to summary judgment as a matter of law.

James F. Bell, Attorney for Plaintiff, Commercial Security Bank of Ogden, 1001 Connecticut Avenue, N.W., Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 9(H)—Filed July 17, 1964

Plaintiff, in support of its cross-motion for summary judgment herein, and pursuant to Rule 9(h) of the Local Rules of this Court, hereby sets forth a statement of the material facts in support to its cross-motion for summary judgment and contends there is no genuine issue as to these facts so stated:

1. Plaintiff is a State bank chartered on July 30, 1925, under the banking laws of the State of Utah and is engaged in that State in the business of banking. It maintains its principal place of business at Ogden, Utah, and, in addition, is operating a branch bank within the corporate limits of the City of Ogden, Utah, under the au-

thority of the laws of the State of Utah and subject to the control and supervision of the Bank Commissioner of the State of Utah. (Complaint, para. 2)

2. On June 25, 1963, the First Security Bank of Utah N.A. filed an application with the defendant Comptroller of the Currency, Washington, D. C., pursuant to Title 12 United States Code, Section 36(c) requesting permission, approval and authorization from said defendant to establish and operate a branch bank on Harrison Boulevard, [fol. 20] between 30th and 36th Streets, in Ogden, Utah. (Complaint, para. 2; Memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 1)

3. The First Security Bank of Utah, N.A., is a national banking association chartered by the Comptroller of the Currency under the National Bank Act to do a banking business in the City of Ogden, Utah, where it maintains its principal office and one branch (Complaint, para. 4; Memorandum of Defendant First Security in Support of Motion for Summary Judgment, para. 2).

4. There are four banks transacting business in the City of Ogden, Utah. Plaintiff, Defendant First Security Bank of Utah, N.A., the Bank of Utah, and the Bank of Ben Lomand. (Complaint, para. 7)

5. The City of Ogden (1960 Pop. 70,197) is a city of the "second class", as such city is defined in Utah Code Ann. Title 10, Chap. 1, Sec. 1 (1953 as amended), having a population of more than 30,000 and less than 90,000 persons. (Complaint, para. 6)

6. On June 9, 1964, the Defendant Comptroller notified the Defendant First Security Bank of Utah that its branch application was approved, but he has not yet set a date for the issuance of the certificate of authority authorizing Defendant First Security to operate such branch.

7. On July 19, 1963, Judge Curran issued a temporary restraining order prohibiting the Comptroller from issuing

a certificate of authority to First Security. Prior to the expiration date of that order, counsel for Commercial Security and Comptroller filed a Stipulation with this Court by which it was agreed "that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction," and "that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the [fol. 21] Comptroller's intention to issue the certificate, Commercial Security Bank will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction". Notice has not been given pursuant to the Stipulation. (Stipulation between counsel for Commercial Security and Defendant Comptroller filed with this Court; memorandum of Defendant Comptroller in Support of Motion to Dismiss, p. 2.)

Respectfully submitted,

James F. Bell, Attorney for Plaintiff, Commercial Security Bank of Ogden, 1001 Connecticut Avenue, N.W., Washington 6, D. C.

In United States District Court

Motion of Intervenor for Summary Judgment—
Filed June 26, 1964

Comes now Intervenor, First Security Bank of Utah, N.A., and moves this Honorable Court to grant summary judgment on behalf of Defendants herein and as grounds therefor states:

1. There is no dispute between the parties as to any relevant facts herein.

2. As a matter of law, the Comptroller of the Currency:

(a) has the authority to issue a branch certificate to Intervenor;

(b) is not bound by Utah law except as to location, and, therefore, has discretionary power to grant the authority to establish a branch to Intervenor.

[fol. 22] Wherefore, the premises considered, Intervenor, First Security Bank of Utah, prays that this Honorable Court grant its Motion for Summary Judgment.

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Charles J. Steele, 815-15th Street, N.W., Washington, D. C. 20005, Attorneys for Intervenor, First Security Bank of Utah, N.A.

IN UNITED STATES DISTRICT COURT

DEFENDANT, FIRST SECURITY BANK OF UTAH'S, STATEMENT OF MATERIAL FACTS UNDER RULE 9(H)—Filed July 17, 1964

Defendant, First Security Bank of Utah, in support of its Motion for Summary Judgment herein, and pursuant to Rule 9(h) of this Court, hereby sets forth a Statement of Material Facts in support of its Motion for Summary Judgment:

1. Plaintiff, Commercial Security Bank, is a State bank with its principal office in Ogden, Utah.

2. Defendant, First Security Bank of Utah, is a National bank with its principal office in Ogden, Utah.

3. Defendant, First Security Bank of Utah, a National bank, applied to the Comptroller of the Currency on June 25, 1963 for authority to open a branch in Ogden, Utah, on Harrison Avenue.

4. Subsequently, on July 3, 1963, the Plaintiff, Commercial Security Bank, filed its application to move its 25th Street Branch to Harrison Boulevard. On July 11, 1963, the State Banking Commission gave its written approval to said Bank for the change in location as requested.

[fol. 23] 5. On July 18, 1963, Plaintiff filed its Motion herein for Declaratory Judgment, Injunctive Order and for a Preliminary Injunction.

6. Banks located in Ogden, Utah, are:

(1) Plaintiff, Commercial Security Bank;

(2) Defendant, First Security Bank of Utah;

(3) The Bank of Utah; and

(4) The Bank of Ben Lomand.

Respectfully submitted,

Whiteford, Hart, Carmody & Wilson, By John J. Wilson, Charles J. Steele, 815-15th Street, N.W., Washington, D. C. 20005, Attorneys for Defendant, First Security Bank of Utah, N.A.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, TO DISMISS THE COMPLAINT—Filed October 7, 1964

Defendant, James J. Saxon, Comptroller of the Currency, by his undersigned attorneys, moves the Court to enter an order dismissing the complaint upon the grounds that:

1. Plaintiff lacks standing to maintain this action, and
2. The complaint fails to state a claim upon which relief can be granted.

[fol. 24] Attached hereto and in support of this motion is a memorandum of points and authorities.

John W. Douglas, Assistant Attorney General.

Harland F. Leathers, R. Dickey Hamilton, Attorneys, Department of Justice, Attorneys for James J. Saxon, Comptroller of the Currency.

In United States District Court

Memorandum and Order—December 18, 1964

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the Currency, pursuant to Title 12, United State Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, [fol. 25] the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, on July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

". . . that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction . . . that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction."

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its busi- [fol. 26] ness and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 323 F. 2d 290, 300 (C.A.D.C., 1963), cert. granted 376 U.S. 948:

"The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would

result in irreparable injury to their property rights in their charters."

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra*, at page 300, the Court stated, ". . . there is no discretion to unlawfully issue a certificate", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish [fol. 27] and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . .* ". [emphasis supplied].

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> "Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks,

state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.*" [emphasis supplied].

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, there-
[fol. 28] fore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the

[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor,* 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was " . . . the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches." (at page 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defen-[fol. 29] dant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels impelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12, U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states [fol. 30] are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced that the Comptroller in his 1924 report (Government Printing Office), stated at page 4:

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[2] 12 U. S. C. A. §§ 36(c), 51, 85, 92a(a), and 214c.

"The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system."

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such [fol. 31] establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks . . .".

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra,* that it is bound to hold that the exact standards of the Utah branching law must be

applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N.A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, [fol. 32] Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

Ordered, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

Ordered, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

Ordered, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

It Is Further Ordered, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N.A., which is the subject matter of this cause of action.

Leonard P. Walsh, Judge.

In United States District Court

Notice of Appeal—Filed February 12, 1965

Notice is hereby given this 12th day of February, 1965, that First Security Bank of Utah, N.A., Intervenor-Defendant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in favor of Plaintiff, Commercial Security Bank, against said [fol. 33] Defendants, First Security Bank of Utah, N.A. and James J. Saxon, Comptroller of the Currency.

Charles J. Steele, Attorney for First Security Bank of Utah, N.A.

In United States District Court

Notice of Appeal—Filed February 12, 1965

Notice is hereby given this 15 day of February, 1965, that defendant, James J. Saxon, Comptroller of the Currency hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of December, 1964 in

favor of Commercial Security Bank and against the defendant, James J. Saxon, Comptroller of the Currency.

Richard S. Beatty, Attorney for Def., James J. Saxon.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO DOCKET AND FILE RECORD—March 17, 1965

Pursuant to the provisions of Rule 73(g) of the Federal Rules of Civil Procedure, it is this 19th day of March, 1965,

Ordered, that the Intervenor First Security Bank of Utah's time for filing and docketing the record on appeal with the United States Court of Appeals for the District of Columbia Circuit is hereby extended fifty (50) days, to and including May 13, 1965.

Burnita Shelton Matthews, Judge.

[fol. 34]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 19,356

FIRST SECURITY BANK OF UTAH, N. A., Appellant,

v.

COMMERCIAL SECURITY BANK, Appellee.

No. 19,357

JAMES J. SAXON, Comptroller of the Currency, Appellant,

v.

COMMERCIAL SECURITY BANK, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and Tamm, Circuit Judges.

JUDGMENT—November 18, 1965

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James J. Saxon, Comptroller of the*

Currency, et al., decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further Ordered by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: Nov 18 1965

[fol. 35] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 36]

SUPREME COURT OF THE UNITED STATES

No. 1009, October Term, 1965

FIRST SECURITY BANK OF UTAH, N. A., Petitioner,

v.

COMMERCIAL SECURITY BANK.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 875 and 1126 and two hours are allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.